APPENDIX.

APPENDIX

Opinion of the Court of Appeals, Tenth Circuit
Filed October 30, 1968

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September, 1968, Term

Number 13-68

CAPTAIN DALE E. NOYD,

Appellant,

vs.

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Appellees.

Number 14-68

CAPTAIN DALE E. NOYD,

Cross-Appellee,

vs.

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

(District Court Number 7580)

Marvin M. Kafpatkin, New York, New York (John DeJ. Pemberton, Burt Neuborne, New York, New York, Paul A. Phillips and F. Willard Kitts, Albuquerque, New Mexico, on the brief) for Appellant and Cross-Appellee.

John Quinn, United States Attorney, Albuquerque, New Mexico (John A. Babington, Assistant United States Attor-

ney, Albuquerque, New Mexico, on the brief) for Appellees and Cross-Appellants.

Before PHILLIPS, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

On March 8, 1968, Dale E. Noyd, a captain in the United States Air Force, was convicted by a general court-martial of violating Article 90 of the Uniform Code of Military Justice in that he wilfully disobeyed a lawful military order. He was sentenced to dismissal from the service, forfeiture of all pay and allowances and confinement for one year at hard labor. On May 10, 1968, the general court-martial convening authority, General Charles R. Bond, approved the conviction and ordered Noyd removed to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, pending completion of military appellate review. Before the transfer order could be carried out, this petition for habeas corpus was filed in the federal district court of New Mexico. The petition asserted the foregoing facts and sought either release on bail or, in the alternative, maintenance of the pre-existing condition of confinement, namely, arrest in quarters at Cannon Air Force Base, Clovis, New Mexico.

The district court determined that to allow the transfer to Fort Leavenworth would be tantamount to an execution of the sentence prior to the completion of military review procedures. This being prohibited by Article 71(c) of the Uniform Code of Military Justice (UCMJ),[1] it was decreed

[1] Article 71(c) of the Uniform Code of Military Justice provides: "No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more, may be

that appellant be relieved from said order. Pursuant to the court's directive, the Air Force rescinded the transfer order and directed that appellant be placed under guard and restricted to a room in the Visiting Officer's Quarters at Cannon Air Force Base. Both parties being dissatisfied with the disposition of the matter as it presently stands, this appeal followed.

At the outset we are faced with the familiar question of exhaustion of military remedies. Under well established military appellate procedure, appellant is entitled to obtain a review of his conviction by an Air Force Board of Review and, if a petition for review is granted, by the United States Court of Military Appeals. At the present time, the Board of Review has heard oral argument although no decision has yet been rendered. Thus, it is apparent that the military appellate procedures have not been pursued to finality.

It is well established, not only in this court[2] but by the United States Supreme Court[3] that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted. The policy underlying the requirement of exhaustion of state remedies applies with equal force to attacks upon the propriety of military confinement. Military law and

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executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U.S.C. § 871(c).

[2] Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1082; Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963); McKinney v. Finletter, 205 F.2d 761 (10th Cir. 1953); Hunter v. Beets, 180 F.2d 101 (10th Cir. 1950), cert. den. 339 U.S. 963; and McMahan v. Hunter, 179 F.2d 661 (10th Cir. 1950), cert. den. 339 U.S. 968. See Annot., 15 A.L.R. 2d 387 (1949).

[3] Gusik v. Schilder, 340 U.S. 128 (1950).

state law both exist substantially independent and apart from the law governing the federal courts. All three separate judicial establishments necessarily reflect the effects of diverse functions. For this court to intervene in military matters prior to the full utilization of all means of rectification provided by that separate entity might well constitute a needless interference with the procedures established to police the errors of that tribunal. Accordingly, if an available procedure has not been employed to permit the military to correct an alleged deficiency it is not for this court to undertake an untimely intervention.

Admittedly, appellant does not now attempt to collaterally attack the judgment of the court-martial on the merits. He seeks instead to obtain relief from his detention pending military appeal. Nonetheless, it is clear that this issue can be raised in the same manner on appeal to the proper military tribunal as if it related to any other failure to fully comply with the UCMJ.[4] Indeed, the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ in circumstances such as these.[5] Hence, it cannot be gainsaid that through a proper utilization of the review procedures established by the UCMJ appellant can raise the same issues presented here without going outside the system which initially, and at all times heretofore, has had the primary responsibility for his present confinement. As a result, available military review procedures remain to be utilized. We conclude,

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[4] E.g., United States v. Smith, 2 CMR 817 (1952); United States v. Ranes, 3 CMR 550 (1952); United States v. Lucero, 18 CMR 942 (1955); and United States v. Lock, 36 CMR 72 (1965).

[5] Levy v. Resor, 37 CMR 399 (1967).

therefore, that appellant has failed to exhaust his military remedies.[6]

The order of the district court in granting partial relief is therefore vacated and the judgment is REVERSED.

[6] This court in requiring that appellant first exhaust all available military remedies, does so after fully recognizing that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." Burns v. Wilson, 346 U.S. 137, 140 (1953).

Opinion of the District Court, District of New Mexico, Dated May 24, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Civ. No. 7560

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force, et al.,

Respondents.

DECISION AND ORDER

PAYNE, Chief Judge.

This cause came on for hearing on the 23rd day of May, 1968, at 10:00 a.m., on an Order to Show Cause issued by this Court on May 16, 1968, requiring the respondents to show cause why a writ of habeas corpus should not issue herein as prayed for in the petition. The petitioner was present in person and by his attorneys. The petitioner was represented by Marvin M. Karpatkin and other attorneys. The respondents were represented by the Honorable John Quinn, United States Attorney, and others. No testimony was taken, but each side argued the case at length. Since no opposing testimony was offered, the Court took the petition to be true, and this opinion is based upon such facts.

It may be noted at the outset that the function of a Federal District Court in a case such as this is not to re-evaluate the evidence and make a determination of the petitioner's guilt or innocence. The extent to which this Court should inquire into this matter has been defined by the Tenth Circuit as follows:

> "(1) The scope of judicial review of military habeas corpus cases is well established. Court inquiry is limited to whether the court-martial had jurisdiction of the person and the offense charged, whether the accused was accorded due process of law as contemplated and assured by the Uniform Code of Military Justice, and whether competent military tribunals gave fair and full consideration to all the procedural safeguards deemed essential to a fair trial under military law."

Gorko v. Commanding Officer, 314 F.2d 858 (1963). In Kennedy v. Commandant, 10 Cir., 377 F.2d 339, the same court, speaking through Chief Judge Murrah, reiterated the above expressed formula.

The facts presented by this case are as follows: Petitioner was convicted by a general court-martial for violation of Article 90 of the Uniform Code of Military Justice for a willful violation of a lawful order. This conviction occurred at Cannon Air Force Base near Clovis, New Mexico, and the judgment of the conviction was rendered on March 8, 1968. The petitioner was sentenced to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor, and on May 10, 1968, General Bond approved the findings and sentence of such general court-martial and directed that

the petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

Article 71(c) of the Uniform Code of Military Justice (10 U.S.C. § 871(c)) reads as follows:

> "(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

There is a disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.

Respondents contend that Article 57 of the Uniform Code of Military Justice (10 U.S.C. § 857), specifically subsection (b), which provides that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial * * *", permits or requires confinement of petitioner in the manner attempted. The Court disagrees with this contention. Article 57 is of a general nature, and it seems to the Court that Article 71 creates specific exceptions to the application of Article 57. Furthermore, if these sections are indeed to some degree incompatible, the Court believes that any such conflict should be resolved in the petitioner's favor.

The Court has concluded that it has no jurisdiction to tell the respondents what conditions of restraint may be imposed upon the petitioner, or what conditions of release, if any, might be imposed. The Bail Reform Act of 1966 specifically excludes offenses of the type involved here from the jurisdiction of the district courts. The case of Levy v. Resor, et al., 17 U.S.C.M.A. 135, 37 C.M.R. 99, holds that the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and that, in the military, there is no statutory provision for such bail. This Court agrees with that decision, and concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those are matters that are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that the petitioner should be confined during the review procedures. This Court is not attempting to rule on any of those questions. The Court merely holds that sending the petitioner to Fort Leavenworth would, in effect, amount to execution of the sentence.

It has traditionally been held that a writ of habeas corpus is unavailable to question a sentence to be served in the future. In Rowe v. Peyton, 383 F.2d 709 (4th Cir., 1967), however, the Fourth Circuit observed that since McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238, the Supreme Court has adopted a more liberal, less technical concept of the writ, and the Court concluded that a writ might be granted concerning a sentence to be served in the future.

The Fourth Circuit in *Rowe* felt that the Federal habeas corpus writ was available "to serve the clearly present

need of a procedural device to test the legality of these convictions (which involved sentences to be served in the future) • • • " 383 F.2d 709, 710.

The petitioner in the present case has not yet been incarcerated at Fort Leavenworth; however, an order has been issued requiring him to go there, and the Court believes that a present need exists to test the legality of such order.

An important question raised by this proceeding is whether this action is premature in view of the fact that the petitioner has not exhausted his military remedies. The Court is familiar with the exhaustion principle, and the wording of the judicial code which codifies this principle, 28 U.S.C.A. § 2254. "The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts." Gusik v. Schilder, 340 U.S. 128, 131, 132, 71 S.Ct. 149, 151, 95 L.Ed. 146.

It is the Court's opinion that the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights. In view of the determination on the part of the Air Force to execute petitioner's sentence before completion of the prerequisites to execution of sentence provided by Article 71(c), U.C. M.J., the Court has concluded that the circumstances warrant a partial granting of the writ requested notwithstanding petitioner's failure at this point to have exhausted his military remedies. 28 U.S.C.A. § 2254(b). To require petitioner to await completion of the appellate review process would be to permit execution of his sentence. Such would constitute a deprivation of petitioner's rights under the Uniform Code of Military Justice, Article 71(c).

It is the Court's ruling that (1) the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and (2) the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice.

It is, therefore, ordered and adjudged that the petitioner be, and he is hereby, relieved from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas.

General Court-Martial Order No. 13

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS TWELFTH AIR FORCE (TAC)

Waco, Texas 76703

GENERAL COURT-MARTIAL ORDER
NUMBER 13

10 May 1968

Before a General Court-Martial which convened at Cannon Air Force Base, New Mexico, pursuant to Special Order C-2, Headquarters Twelfth Air Force (TAC), 17 January 1968, was arraigned and tried:

CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524th Tactical Fighter Squadron

CHARGE: Violation of the Uniform Code of Military Justice, Article 90

Specification: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, "To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled," did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same.

PLEAS: To the Charge and Specification: Not guilty

FINDINGS: Of the Specification and Charge: Guilty

SENTENCE: To be dismissed from the service, and to forfeit all pay and allowances, and to be confined at hard labor for one year. (No previous convictions considered.)

DATE ADJUDGED: The sentence was adjudged on 9 March 1968.

ACTION BY CONVENING AUTHORITY

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS TWELFTH AIR FORCE (TAC), Waco, Texas, 10 May 1968

In the foregoing case of CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524 Tactical Fighter Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ Charles R Bond Jr.
CHARLES R. BOND, JR., Maj. Gen, USAF
Commander

FOR THE COMMANDER

[SEAL]

EDWARD D SMITH, Lt Col, USAF
Director of Admin Services

Opinion of the Air Force Board of Review

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

In the Board of Review, United States Air Force

Before

WILSON, *Chairman*, BOUCHER and TORVESTAD, *Members*

Judge Advocates

AFJAMA-2 ACM 20121

UNITED STATES

—v.—

Captain DALE E. NOYD, FR28084,
524th Tactical Fighter Squadron

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3 September 1968

TWELFTH AIR FORCE (TAC)

Sentence adjudged 9 March 1968 by GCM convened at Cannon Air Force Base, New Mexico. Approved sentence: Dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year.

Appearances:

Mr. Marvin M. Karpatkin and Mr. John deJ. Pemberton, Jr., New York, New York, Colonel Dwight R. Rowland, Colonel Joseph E. Krysakowski and Lieutenant Colonel Leonard Eichner, appellate counsel for the accused;

Colonel James R. Thorn and Major Robert L. Bates, appellate counsel for the United States.

Tried by a general court-martial convened at Cannon Air Force Base, New Mexico, the accused was found guilty of willfully disobeying the lawful command of his superior officer, in violation of Article 90 of the Uniform Code of Military Justice. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for one year. The convening authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement pending completion of appellate review.[1]

The specification of which accused stands convicted is as follows:

> "In that [accused] . . . having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."[2]

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[1] The designation of the United States Disciplinary Barracks as the place of confinement pending completion of appellate review is under collateral attack (Noyd v. Bond, Civil No. 7560, —— F. Supp. ——, decided 24 May 1968 (DC NMex 1968), appeal and cross-appeal pending).

[2] Although the order was one to be obeyed *in futuro*, the evidence establishes that accused stated that he would not obey it and he carried out his intention (MCM, 1951, para. 169*b*; CM 349288, Cunningham, 2 CMR 466).

The principal defense advanced by the accused is that the Secretary of the Air Force made an error of law in disapproving the accused's two applications under Air Force Regulation 35-24, DISPOSITION OF CONSCIENTIOUS OBJECTORS, for classification as a conscientious objector and either separation or reassignment as a conscientious objector.

The facts are uncontested. In brief, the accused participated in the Air Force ROTC program at Washington State University for four years and in 1955 graduated as a distinguished military graduate. He then accepted a regular Air Force commission and has been on continuous active duty since that time. He received pilot training and is presently a senior pilot. At the expense of the Air Force he was a graduate student at the University of Michigan for three years and received a masters degree. He also completed the academic study necessary for a Ph.D degree. In return for the Air Force financing his graduate study, he committed himself to serve until June 1969.

In 1966, while a member of the faculty of the Air Force Academy, the accused developed a belief in ethical or religious "humanism", and decided that the conflict in Vietnam is unjust and immoral. He determined to refuse to fight in that conflict, if ordered to do so, but that he would accept assignments to duty consistent with his conscience. He subsequently tendered his resignation under the provisions of AFR 36-12, ADMINISTRATIVE SEPARATION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OF THE AIR FORCE. The Secretary of the Air Force refused to accept the resignation. The accused then submitted the first of two applications under AFR 35-24 for classification as a conscientious objector and either separation or reassignment as a conscientious objector. This application was disapproved by the Secretary of the Air Force.

The accused thereupon commenced an action in a Federal district court seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus. The accused asked for substantially the same relief which had been denied him in his application under AFR 35-24. The district court ordered the action dismissed for lack of jurisdiction (Noyd v. McNamara, 267 F Supp 701 (DC Colo 1967), affd 378 F2d 538 (10th Cir 1967), cert. den. 389 US 1022, 19 L Ed 2d 667, 88 Sup Ct 593).

After the adverse decision in the district court, the accused, who had theretofore been transferred to Cannon Air Force Base, New Mexico, filed his second application under AFR 35-24. In August, 1967, the Secretary likewise disapproved this application.

The circumstances surrounding the offense of which accused stands convicted are concisely set forth in a statement, admitted in evidence as a defense exhibit, of the superior officer named in the specification. It accurately summarizes his sworn testimony at the trial:

> "After I had given Captain Noyd a direct order at 1115 hours, 4 December 67, to fly as scheduled, I released him to return to the squadron. Upon return the Commander of the 524TFS, Lt Colonel James L Glessner, excused him, at his request, to take care of personal matters to wit; visit the legal office. As a consequence, I requested he be informed of the flight schedule of 5 December which ordered him to fly as instructor in an F-100F with a student. Further, I requested he return to see me at 1545 on 4 December at which time I stated:
>
> 'I understand your squadron commander approved your request at noon for time to take care of personal

matters. This occurred after I had given you a direct order to comply with the flight schedule which assigned you to a training flight in an F-100F with 2nd Lt Matthew A Husson with takeoff at 1310.

'As a consequence, I am giving you a direct order to perform duties as instructor pilot tomorrow, 5 December, as scheduled. As I stated previously, I am aware of your conscientious beliefs with regard to performing duties as an instructor pilot, your application to be classified as a conscientious objector which has been denied and that you have taken this matter up with the federal courts and that you are awaiting a decision by the Supreme Court of the United States.

'Until such time the federal courts render a decision favorable to you, you are still required to perform proper military duties assigned to you and obey all lawful orders given to you and that your failure to do so can conceivably result in trial by General Courts-Martial. I am not desirous in resorting to such course of action, and therefore, I am giving you a direct order to perform duties as instructor pilot as scheduled. I have nothing further to add.'

"Captain Noyd stated that after he had declined to fly he thought it was clear to everyone that he was not following orders. Further he stated that he fully understood what I had stated and asked if there was anything more, saluted, and left."

The accused testified that he "knew in advance" that he could not obey the order; that at the time he was not suffering from any mental disease, or derangement of a nature

that could have prevented him from knowing the difference between right and wrong and adhering to the right; and that the violation of the order was a conscious, voluntary choice on his part. He also testified that, "In a sense I would say I had no choice, because I felt that it was what I must do".

After the trial, individual defense counsel assigned 18 errors and presented oral argument to the Staff Judge Advocate. The allegations of error were extensively discussed in the competent and scholarly review of the Staff Judge Advocate and resolved adversely to the accused. Appellate defense counsel have assigned 19 errors, 18 of which are identical with those assigned and argued below and resolved in the review. We agree with the Staff Judge Advocate's disposition of these allegations and adopt his conclusions, with the further discussion set forth hereinafter. As to the remaining assigned error submitted by appellate defense counsel, we find that it is entirely without merit and requires no discussion.

Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court-martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:

> "The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause

14, of the Constitution 'To make Rules for the Government and Regulation of the land and naval Forces' (Reid v. Covert, 354 US 1, 1 L Ed 2d 1148, 77 Sup Ct 1222). In its exercise of this power, the Congress did not include in the Uniform Code of Military Justice a grant of jurisdiction to military tribunals to review such administrative determinations.

"Voluntarily enlisted servicemen are a distinct class from inducted civilians. Military regulations providing a procedure for voluntarily enlisted servicemen to request discharge on the ground of conscientious objection reached after enlistment do not deny procedural due process or equal protection under the Constitution. And it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process (Brown v. McNamara, 387 F 2d 150 (3rd Cir 1967) [cert. den. sub nom. Brown v. Clifford, 390 US 1005, 20 L Ed 2d 105, 88 Sup Ct 1244])." (*Dunn*, supra, at p. ——).

It is not within our province to suggest at what stage a question of substantive due process in proceedings under AFR 35-24 may be ripe for adjudication in the Federal courts. In this connection, we observe that in *Noyd*, supra, the Court of Appeals, in affirming the order of the district court dismissing the action for lack of jurisdiction, held that:

"The *essence* of appellant's claim is that the Federal judiciary should review and determine the validity of military assignments to duty. This we cannot do." (378 F 2d, at p. 540). (Emphasis added).

We also observe that in a recent military habeas corpus case involving a conscientious objector claim, Hammond v. Lenfest, No. 31909, —— F 2d —— (2d Cir), decided 10 June 1968, the court stated:

> "Principal reliance is placed [by the Government] upon the recent decision in Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), aff'd, 378 F. 2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967), in which the District Court refused to examine the conscientious objector claim of an Air Force captain with 11 years' service who was not a 'total pacifist' but was merely opposed 'to the war that this country is waging in Vietnam.'" 267 F. Supp. at 703-04. It is possible to read Noyd as nothing more startling than an application of the settled doctrine that the federal courts will not interfere with duty assignments of persons lawfully in the armed forces, Orloff v. Willoughby, 345 U.S. 83 (1953). See Crane v. Hedrick, —— F. Supp. ——, —— (N.D. Cal. 1968). To the extent that Noyd might suggest that a court martial is a prerequisite for federal court review of the claim that the petitioner, at the time of bringing suit, is not lawfully in the armed forces, we reject its reasoning. For several sufficient reasons we hold that Hammond's claim is now ripe for adjudication.
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> . . . . . .
>
> "Furthermore, Hammond contends—and the government does not assure us otherwise—that a court martial would consider itself bound by the determination of the Chief of Naval Personnel and would not entertain a challenge to the denial of Hammond's request. See Brown v. McNamara, 387 F. 2d 150, 153 n. 5

(3d Cir. 1967), cert. denied, —— U.S. —— (1968) (noting, but not ruling upon, the instant contention). And, we are referred to no case that suggests that presenting a conscientious objector claim as a defense to a charge of violating military law by failing to obey orders would be anything more than a futile and ritualistic gesture. The law knows of no such requirement."

As to the claim that the law officer erred in refusing the defense's requested instructions involving the proposition that accused's beliefs could have rendered him mentally incapable of intentionally defying authority, the record clearly establishes that the accused, the same as Cupp (ACM 13462, Cupp, 24 CMR 565, 572), made a self-determined, voluntary, and intentional choice as to which military orders and duties he would accept or reject. *Dunn* likewise governs this issue. The relevant language in *Dunn* follows:

"It is well established that a self-determined conscientious objection is not a defense to the willful disobedience of military orders. As recently held by an Army Board of Review in a similar case involving a self-determined conscientious objector:

"'We reduce the applicable military law, as we see it, to one simple statement,

'Personal scruples or qualms, whether based upon religious conviction, personal philosophy or other, are no defense to military offenses. (Subpara 169b, MCM, US, 1951; ACM 9036, Morgan, 17 CMR 584; ACM 13462, Cupp, 24 CMR 565).' (CM 413709, Taylor, 37 CMR 547, 552).'" (Dunn, supra, at p. ——).

Moreover, the record discloses that the instructions given by the law officer in this respect exceeded the requirements of the law, and in fact are substantially in accord with the defense's requested instructions. Having received a gratuity, the accused can not now be heard to complain.

The remaining assigned error for our discussion is that the law officer erred in denying the accused's challenge to the array for cause and the motion for mistrial based thereon.

After an extensive voir dire of the 10 court members, individual defense counsel made a motion either to dismiss the entire panel or to grant a mistrial. He pointed out that the examination revealed that all 10 members of the court, except one, had either served in Southeast Asia, or were involved in the training of personnel for service in that area. He argued that this circumstance alone was sufficient *as a matter of law* to establish that the members could not be fair and unbiased.

The law officer ruled that the motion was, in effect, a challenge for cause against the entire panel. In overruling the motion, the law officer advised that the ruling did not preclude the defense from challenging individual members and having such challenges determined by the other members. Defense counsel stated that he was not making any challenges for cause as it would be futile. He challenged one member peremptorily.[3]

Appellate defense counsel have submitted to the Board of Review a roster of all field grade officers (except chap-

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[3] Appellate defense counsel criticize the procedure for challenges for cause prescribed in Articles 41, 51, and 52 of the Code. In this regard, we need say no more than that the United States Court of Military Appeals, in sustaining the present procedure, has recommended amendatory legislation (U.S. v. Cleveland, 15 USCMA 213, 35 CMR 185).

lains) assigned to the 12th Air Force as of the date of the appointing order.[4] According to the roster, at that time there were 1623 so assigned. Of that number, 550, or 34%, had their last tours of duty in Southeast Asia. Counsel argue that since only 34% of the officers assigned to the 12th Air Force had their last tours of duty in Southeast Asia, the fact that 80% of the panel in this case consisted of recent Southeast Asia returnees gives the appearance of a hand-picked panel. They present this novel argument in their brief:

> "Among the members of the array were officers who had flown one hundred and more combat missions in Southeast Asia. Many of them undoubtedly had friends who were shot down. It is common knowledge that every Air Force man who flies in combat has great concern for the safety of his 'wing man', and expects his wing man to have similar concern for him. Added to the combat experience is the ingrained attitude of obedience to all orders without question . . . . When a career officer, a fighter pilot, accused of disobeying an order to train a pilot for combat in Vietnam, is put on trial before a General Court, it would require more than normal human efforts to overcome possible bias, even for a single court member. But where 4/5th of the court are all subject to these same conditioning factors, it is simply impossible to have a fair trial."

Understandably, the defense cites no authority, and our research has found none, which suggests that combat ser-

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[4] Submission of roster made on motion granted by the Board of Review in the exercise of its discretionary authority (Rule 18e, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, 37 CMR xv, xx).

vice as a member of the armed forces of the United States can result in disqualification *as a matter of law* to serve as a member of a court-martial.

Obviously, it could not be seriously contended that those who have served honorably on the field of battle are disqualified *as a matter of law,* individually or collectively, to serve as members of a court-martial in trials involving heinous offenses, such as mutiny or sedition (Article 94), cowardly conduct in the presence of the enemy (Article 99), or aiding the enemy (Article 104). *A fortiori,* a combat background cannot be considered disqualifying as a matter of law in trials involving any offenses of lesser gravity.

The record discloses no impropriety in the selection of the members of the court. They were not "minions of law enforcement agencies" (U.S. v. Hedges, 11 USCMA 642, 29 CMR 458, concurring opinion by Judge Latimer). There is no appearance of a court hand-picked to favor the prosecution. We conclude that the convening authority appointed as members of the court only such persons as, in his opinion, were "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament" (UCMJ, Art. 25(d)(2); MCM, 1951, para. 4*d*). There is no evidence to the contrary.

The record of trial clearly establishes there was no bias on the part of any court member. All members expressed their willingness to try the case on the evidence and to follow the instructions on the law given by the law officer.

An accused is not entitled to favorable court members or any particular kind of juror (U.S. v. Sutton, 15 USCMA 531, 36 CMR 29). He has no right to jurors who believe him innocent; however, he does have an unqualified right to jurors whose minds are uncommitted (U.S. v. Deain, 5 USCMA 44, 17 CMR 44). We are fully satisfied the accused

was afforded that right and that the law officer properly denied the motion for a mistrial (U.S. v. Waldron, 15 USCMA 628, 36 CMR 126).

In addition, the fairness and impartiality of the court members is demonstrated by the fact that, notwithstanding the seriousness of the offense, they adjudged a lenient sentence.

In evaluating the appropriateness of the sentence, we have thoroughly considered all the factors and surrounding circumstances in the record. We conclude that the approved sentence is appropriate and should be affirmed.

Article 66(c) having been complied with, the findings of guilty and the sentence are

AFFIRMED.

CHESTER W. WILSON
ERNEST BOUCHER
ROBERT J. TORVESTAD

Opinion of the District Court, District of Colorado, Dated March 29, 1967

Noyd v. *McNamara, et al.*

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger*, 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States*, 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn*, 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly

would be referred back for a hearing in depth on its merits. So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.